Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

Laureen B. Taylor
Petitioner.

v.

DEPARTMENT OF VETERANS AFFAIRS
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMENDED PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED

Whether the lower courts' decision that removal from employment was within the tolerable limits of reasonableness for the Appellant's brief effort to give a psychiatric patient a haircut and a shave on September 23, 2003, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by substantial evidence?

PARTIES IN THE PROCEEDING

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LAUREEN B. TAYLOR,
PETITIONER

VERSUS

DEPARTMENT OF VETERANS AFFAIRS
RESPONDENT.

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A. ISSUE ONE

WHETHER THE LOWER COURTS' DECISION THAT REMOVAL FROM EMPLOYMENT WAS WITHIN THE TOLERABLE LIMITS OF REASONABLENESS FOR THE APPELLANT'S BRIEF EFFORT TO GIVE A PSYCHIATRIC PATIENT A HAIRCUT AND A SHAVE ON SEPTEMBER 23, 2003, ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW, OR UNSUPPORTED BY SUBSTANTIAL EVIDENCE?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this matter filed on March 17, 2006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit appears at Appendix 1 to the petition and is unpublished.

The opinion of the United States Merit System Protection Board appears at Appendix 2 to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals filed its judgment on March 17, 2006. App. 1. The jurisdiction of this Court is invoked under 5 U.S.C. § 7701 and 5 U.S.C. § 7703.

STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case at bar include the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Your Petitioner appeals the final decision of the United States Court of Appeal for the Federal Circuit rendered on March 17, 2006 and the decision from the United States Merit System Protection Board which was rendered on March 29, 2005.

Your Petitioner seeks to reverse the initial decision of its administrative judge and to reinstate the removal penalty imposed on her by Respondent on December 12, 2003.

Your Petitioner is a Licensed Practical Nurse (LPN) who was employed at the VA Medical Center in Biloxi, Mississippi. She had 17 years of service and no record of prior discipline. She was fired for trying to give a haircut and a shave on September 23, 2003, to a psychiatric patient, Mr. "S", whose hair and beard were exceptionally long and unkempt. Mr. "S" did tell the Petitioner he did not need a haircut, but she said he needed one and proceeded without him objecting. After finishing the haircut, your Petitioner began to trim Mr. "S"'s beard. Mr. "S" protested, reached up for the scissors and another LPN, Bruce Kennemore, grabbed the patient's wrists. Mr. "S" continued to struggle for about twenty seconds, after which your Petitioner told Mr. Kinnemore that Mr. "S" was fussing and let's just leave him alone. Mr. "S" complained about the incident two days later. The Respondent terminated both your Petitioner and Mr. Kinnemore. Both employees appealed to the Merit System Protection Board (MSPB). Mr. Kinnemore was reinstated with no discipline; the Petitioner was reinstated with her discharge mitigated to a 15-day suspension. The Respondent appealed only the initial decision in the Petitioner's case to the MSPB. The MSPB granted the appeal and reimposed on the Petitioner the penalty of removal from employment.

There are four individuals with personal knowledge of the haircut incident on September 23, 2003. These are the Petitioner, Mr. Kinnemore, Ms. Lisa Trentcosta (another nursing assistant employed by the Respondent on a contractual basis), and Mr. "S", the patient.

All but Ms. Trentcosta testified at the in-person hearing before Administrative Judge Joseph Clancy. The Respondent asked to call Ms. Trentcosta as a rebuttal witness at the end of the hearing, but Judge Clancy declined to permit her to testify at that point. See Joint Appendix ("Joint Appx.") at 250-51.
The Respondent did not object to this ruling nor raise it in its September 15, 2004 appeal to the MSPB. Joint Appx. at 265.

The first record of the September 23, 2003 haircut incident is a "report of contact" dated September 25, 2005 by Loretta Eleuterius, the head nurse, who stated that Mr. "S" complained to her also on that day. Joint Appx. at 24. Mr. "S" then reported the incident to Alma Jimerson, a social worker employed by Respondent. Joint Appx. at 25. Another "report of contact" dated September 25, 2003, by another one of Respondent's employees, Leroy Weingart, says that on the evening of September 24, 2003, Ms. Trentcosta told him that Ms. Taylor gave Mr. "S" a shave against his will. Joint Appx. at 26. Ms. Trentcosta wrote her own report of contact on September 25, 2003, saying that on September 23, 2003, Ms. Taylor made a comment about cutting Mr. "S"'s hair, that Mr. "S" was brought to the bathroom, that while Ms. Trentcosta was gone, Mr. "S"'s hair was cut and his beard was trimmed, that when Ms. Trentcosta arrived back at the bathroom with Mr. Kinnemore, the Petitioner asked her to hold Mr. "S" down, but when she saw Mr. "S" was fighting, she left. Joint Appx. at 27.

The Respondent then undertook an investigation and a five-person panel of its employees interviewed a number of witnesses in early October 2003. The panel issued its report on October 10, 2003. Joint Appx. at 115. The panel concluded that numerous employees who heard of the incident did not report it in a timely manner. Joint Appx. at 118. The panel also concluded:

> the allegation of patient abuse is substantial. We do not believe that the incident was begun with malice by any of the th[illegible] personnel, but progressed to malicious behavior by Ms. L. Taylor LPN only.

Joint Appx. at 118.

The Respondent proposed to remove Mr. Kinnemore and the Petitioner from employment. Joint Appx. at 122. Ms. Trentcosta's contract employer was informed by the Respondent that her services would not be needed anymore. Joint Appx. at 138. Your Petitioner submitted her written reply, through her union representative. Joint Appx. at 124. Your Petitioner explained that she had given Mr. "S" a haircut and cleaned him up a couple of months earlier before he left for an appointment at the New Orleans Medical Center and that he seemed grateful for this. The Petitioner further said that she had gotten along well with him in the year and one-half he had been at the Biloxi Medical Center. Your Petitioner described how Mr. "S"'s hair was unsanitary and knotted, which is why she gave him a haircut. She said she was deeply hurt after realizing that Mr. "S" was upset, that she felt deep remorse and that words could not express the turmoil that she felt on behalf of Mr. "S". Joint Appx. at 125. This was consistent with her testimony before the investigating panel. Joint Appx. at 62.

The Medical Center Director, Ms. Julie Catellier, nevertheless decided to terminate your Petitioner and Mr. Kinnemore effective December 12, 2003. Joint Appx. at 130. At the May 12, 2003, hearing before MSPB Judge Clancy, Ms. Catellier explained her reasons for deciding to terminate the Petitioner. Ms. Catellier maintained that the Petitioner blamed it all on Ms. Trentcosta. Joint Appx. at 187. She said the Petitioner expressed no remorse in her written reply. *Id.* She further said that the Petitioner could not understand how Mr. "S" felt violated and so she had no reasonable expectation that the Petitioner would not commit patient abuse in the future. *Id.* at 188-89.

Ms. Catellier then stated that someone from a congressman's office called the medical center to complain that employees who held down a patient weren't being fired. *Id.* Later, she admitted this happened after the Petitioner was terminated. *Id.* at 201.

Respondent called two other employees who were not present at the haircut incident to testify at the MSPB hearing: Mary White, RN, and Monica Koerperich, RN. They heard about it shortly after it happened but did not report it until September 25, 2003. Ms. White tried to distance herself from her prior testimony to the investigative panel on October 8, 2003 that Ms. Trentcosta told her she had held Mr. "S" down. Joint Appx. at 175. Ms. Koerperich agreed that Mr. "S"'s hair was unkempt and that she noticed no change in his mood the day after he got the haircut. Joint Appx. at 181-82.

Mr. "S" testified at the hearing. Whether one listens to the hearing tapes or reads the transcripts, his testimony is not easy to understand. Judge Clancy commented on the record that drugs can affect perception and memory and that having observed Mr. "S" testify he would have to draw his own conclusions. Joint Appx. at 210. In his initial decision, Judge Clancy observed that Mr. "S"'s speech was slurred, his words were unintelligible and that he seemed confused and his memory was clouded. Joint Appx. at 14. In essence, Mr. "S" testified that Mr. Kinnemore held him down and that the Petitioner "started whacking my hair." Joint Appx. at 94. Upon prompting by Respondent's counsel, Mr. "S" said he was frightened by this. *Id.* at 96. Mr. "S" conceded that he was trying to grab at the scissors before Mr. Kinnemore took hold of his wrists. Joint Appx. at 101.

Both Ms. Taylor and Mr. Kinnemore testified at the hearing. Their testimony was consistent with their statements to the investigative panel. The initial decisions of Judge Clancy on both cases found their testimony to be credible based on personal observation. Joint Appx. at 11 and 254. Ms. Taylor, as in her written response to the proposed removal, explained how she had

given Mr. "S" a haircut on an earlier occasion when it was also her idea and not his. Joint Appx. at 11 and 254. She verified that Mr. "S" had taken a narcotic pain reliever and a sleeping pill before the incident. Id at 218. She explained that Ms. Trentcosta told Mr. "S" he needed a haircut and a shave and that she agreed to help Ms. Trentcosta. Your Petitioner started with clippers, which got tangled in Mr. "S"'s hair, after which Mr. "S" said for the first time that he really didn't need a haircut. Your Petitioner told him he did because his hair was so tangled and matted together. Ms. Trentcosta at that point returned with scissors and your Petitioner finished the haircut without any further complaint or resistance form Mr. "S". Ms. Trentcosta then obtained some shaving cream and a razor and was preparing to apply it to Mr. "S"s beard. Your Petitioner asked Ms. Trentcosta to go get Mr. Kinnemore, thinking that, like a number of the male patients, Mr. "S" would be more comfortable with a male nursing assistant.

Your Petitioner was trying to clip around Mr. "S"'s beard when Ms. Trentcosta and Mr. Kinnemore arrived back in the room. Mr. Kinnemore did not know why he had been summoned to help. Joint Appx. at 243. Your Petitioner was trying to trim Mr. "S"'s beard with the scissors - "nip around a little bit" as Mr. "S" described it. Joint Appx. at 31. As Mr. Kinnemore was entering the room, Mr. "S" reached up toward the scissors. Mr. Kinnemore grabbed his writs to pull them away from the scissors. Mr. "S" then struggled for 15 to 20 seconds at which point the Petitioner told Mr. Kinnemore to let him go, that Mr. "S" was fussing and they would just leave him alone. This was the end of the incident. Joint Appx. at 231-32.

Judge Clancy issued his initial decisions on Ms. Taylor's and Mr. Kinnemore's appeals on August 10 and August 11, 2004. Joint Appx.at 11 and 254. As noted earlier, Judge Clancy credited the testimony of both the Petitioner and Mr. Kinnemore based on his personal observations of their demeanor. He made consistent findings of fact in both cases. Judge Clancy concluded that Mr. Kinnemore had no way of knowing he was doing anything wrong

by holding Mr. "S"'s hand and that he did so solely for the safety of the patient and the other employees. Noting that Mr. Kinnemore quickly let go after Mr. "S" started to struggle, Judge Clancy concluded that no patient abuse had been committed by Mr. Kinnemore and reversed Respondent's decision to remove him from employment in its entirety. Joint Appx. at 259. No party appealed and Judge Clancy's decision became a final judgment of the MSPB on September 14, 2004.

Judge Clancy's decision with respect to the Petitioner noted her admission that Mr. "S" at one point said he did not want a haircut but the Petitioner proceeded anyway, even though Mr. "S" did not resist. Based on his assessment of the testimony and the evidence, Judge Clancy soundly rejected the conclusion of the investigative panel that the Petitioner's actions "proceeded to malicious behavior." However, Judge Clancy found that under the circumstances, the Petitioner should have known that Mr. "S" my well perceive the involuntary grooming as abusive or hostile. Joint Appx. at 17. Judge Clancy found Ms. Catellier's testimoy that the Petitioner was assaultive, that she was untrustworthy and that she failed to acknowledge any wrongdoing "simply unsupported by the record.". Id. Concluding that the Petitioner's behavior was "unintentional", that she had done no harm to Mr. "S" and that she had consistently expressed remorse for having offended him, Judge Clancy found that the maximum reasonable penalty for the Petitioner was a 15-day suspension.

The Respondent appealed Judge Clancy's decision to MSPB. Appx at 265. On appeal, the Respondent maintained that the Petitioner intentionally abused Mr. "S" and that Judge Clancy inappropriately substituted his judgment for that of Ms. Catellier.

On March 29, 2005, the MSPB issued its final decision on the Petitioner's appeal. Joint Appx. A at 1. The MSPB found that "the Agency did not charge the Appellant with assault and was not required to prove intent, even though the Agency properly considered the behavior as 'assaultive' in its penalty determination."

Joint Appx. at 3. Without ever disagreeing with Judge Clancy that the Petitioner's behavior was unintentionally or agreeing with Respondent that it was intentional, the MSPB found that Ms. Catellier "weighed the relevant factors in deciding to remove the Appellant" Id. at 4 The entirety of the MSPB's rationale is:

> Even if we were to discount the consideration of "assaultive" behavior, the deciding official appropriately determined that the Appellant's misconduct caused undue stress to a patient who relied on her for compassion and professional service, that the Appellant's position requires a need for sensitivity and advocacy for the patient, that the Appellant's misconduct caused a breach of trust that harms the patients, their families, and the Agency, and that the removal penalty is consistent with the Agency's table of penalties.

Joint Appx. at 4. Based on this, the MSPB upheld Respondent's decision to fire Ms. Taylor.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PREVIOUS RULINGS

Petitioner respectfully requests this Honorable Court to grant this petition for a writ of certiorari because the ambiguous ruling held in this cause.

A. ISSUE ONE

WHETHER THE LOWER COURTS' DECISION THAT REMOVAL FROM EMPLOYMENT WAS WITHIN THE TOLERABLE LIMITS OF REASONABLENESS FOR THE APPELLANT'S BRIEF EFFORT TO GIVE A PSYCHIATRIC PATIENT A HAIRCUT AND A SHAVE ON SEPTEMBER 23, 2003, ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW, OR UNSUPPORTED BY SUBSTANTIAL EVIDENCE?

The MSPB's decision to overturn the decision of its administrative judge and to affirm the Respondent's decision to remove the Petitioner from employment is an abuse of discretion and unsupported by substantial evidence. Key facts relied upon by Respondent and the MSPB have no support in the record. The Respondent and the MSPB also failed to consider a number of important mitigating factors. The MSPB's final decision also inexplicably rejects or ignores key finds of its administrative judge based on testimonial credibility.

According to 5 USC § 7703 (c),this Court must reverse an MSPB decision which is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by substantial evidence. *O'Keefe v. U.S. Postal Service*, 318 F. 3d 1310, 1313 (Fed. Cir. 2002). The MSPB's failure to consider a significant mitigating circumstance in reviewing

a federal agency's decision to fire an employee constitutes an abuse of discretion. *VanFossen v. Dept of Housing and Urban Development*, 748 F. 2d 1579, 1581 (Fed. Cir. 1984). The MSPB also errs when it rejects an administrative judge's credibility determinations based on live testimony at a hearing without articulating sound reasons for doing so. *Haebe v. Dept of Justice*, 288 F. 3d 1288, 1300-1301 (Fed. Circ. 2002).

The Respondent's decision to terminate the Petitioner has been based on factual assertions unsupported by any evidence and rejected by Judge Clancy. Start with the accusation against the Petitioner. According to the letter proposing her removal, she cut Mr. "S"'s hair and trimmed his beard without his consent; Mr. "S" repeatedly stated that he did not want a haircut or a shave; though Mr. "S" resisted while being held down by two other employees, your Petitioner cut Mr. "S"'s hair and trimmed his beard. Joint Appx. at 122.

Three of the four persons involved testified at the hearing before Judge Clancy. Judge Clancy made it clear at the the hearing (Joint Appx. at 210) and in his decision (Joint Appx. at 15) that the testimony of the first individual, Mr. "S", was unreliable, that his speech and words were slurred or unintelligible, that he appeared confused and that his memory was clouded.

The remaining two persons, your Petitioner and Mr. Kinnemore, testified consistently from the date they were interviewed by the investigative panel to the date they testified at the hearing before Judge Clancy. It wasn't even the Petitioner's idea to give Mr. "S" a haircut, but she agreed he needed one. Your Petitioner had cleaned him up and trimmed his hair just a couple of months earlier and he seemed to appreciate this. Ms. "S" was passive and cooperative after being told he was getting a haircut, after being brought to the bathroom for a haircut and up to the point where the clippers the Petitioner was using got tangled ion his hair. At that point, she sent Ms. Trentcosta for scissors and Mr. "S" said he didn't need a haircut, your Petitioner politely disagreed

wit him and she then finished the haircut with a pair of scissors without any protest or resistance from Mr. "S".

Your Petitioner then proceeded to shave Ms. "S"'s beard. She was clipping at his beard with the scissors while Ms. Trentcosta was preparing the shaving cream and the razor. Mr. "S" said he did not want his beard shaved. Your Petitioner stopped and asked Ms. Trentcosta to go get Mr. Kinnemore, assuming that Mr. "S" preferred a male attendant for this task. When Ms. Trentocasta returned with Mr. Kinnemore, your Petitioner was clipping around Mr. "S"'s mouth since he had dried applesauce matted in his beard. Mr. "S" then firmly stated that he did not want his beard cut, and your Petitioner has admitted this from the beginning. Mr. "S" reached up toward the scissors, Mr. Kinnemore reached for Mr. "S"'s wrists and held them down out of concern for everyone's safety. Your Petitioner tried to proceed, Mr. "S" struggled and it was no more than 15 to 20 seconds later that Ms. Taylor stopped, told Mr. Kinnemore to let go of Mr. "S"'s wrists, and that was the end of it. Mr. "S" did not register a complaint until two days later. None of the employees who heard about the incident made a report of any kind until after Mr. "S" registered his complaint.

There is simply no substantial evidence for the proposition that Mr. "S" objected to having his hair cut; that task was completed. It is true that Mr. "S" did not affirmatively express his consent, though nothing in the record suggests that patients must verbally consent to every procedure before it is performed.

It is emphatically not the case that Mr. "S" repeatedly stated he did not want a haircut or a shave and that he physically resisted while being held down by two other employees. Nobody claims the Petitioner held Mr. "S" down. Mr. Kinnemore pulled Mr. "S"'s wrist away from the scissors. Mr. Kinnemore didn't see ms. Trentcosta's hands on Mr. "S" at all. Joint Appx. at 80. Not even Ms. Trentcosta, who did not testify at the hearing, claims that she participated in holding Mr. "S" down. Her first statement claims she was asked to hold Mr. "S" down but that she decided to leave.

Joint Appx. at 27. Her second statement says she stood behind Mr. "S" and had her hands on his shoulders but when Mr. "S" started to resist she left. Joint Appx. at 100. Throughout that statement, Ms. Trentcosta claimed to have been out of the room some or even all the time while the incident was taking place, but also claims to know what Mr. "S" was saying during that time.

Judge Clancy soundly rejected the assertion of the investigative panel that the Petitioner's actions "progressed to malicious behavior." This was based on his crediting the testimony of the Petitioner and Mr. Kinnemore witch, in turn, was based on his observations of t heir testimonial demeanor. This was a finding entitled to deference unless the MSPB provided a reason for rejecting it, which the MSPB did not. Haebe, supra, at 1301.

The MSPB's conclusion in its final decision that "the Appellant continued her actions while the patient was held down by two other employees, even though the patient continued his resistance" is either false or a gross exaggeration. Mr. "S" was ***not*** being held down by two other employees. Mr. Kinnemore was restraining his wrists because Mr. "S" reached for the scissors. Mr. "S" did not say he didn't want a haircut; he did not say he did not want a shave until Mr. Kinnemore entered the room. At that point Mr. "S" reached for the scissors, Mr. Kinnemore restrained him, Mr. "S" resisted and the Petitioner told Mr. Kinnemore to let him go and it was over – all in the space of 15 to 20 seconds.

The Respondent says that the Petitioner deliberately abused Mr. "S". Joint Appx. at 137. The investigative panel (the same group who concluded that the Petitioner's actions proceeded to "malicious behavior") found that "it was common knowledge of the staff that patient "S" does not like to have his hair cut." Joint Appx. at 117. Not so common that the Petitioner knew, however. The Respondent was asked in pre-hearing discovery "was there any time before September 23, 2003, when the Appellant was advised that Mr. "S" does not like to have his hair cut or his beard trimmed? If yes, state who advised him of t his and when."

The Respondent's response was "NO". Joint Appx. at 137.

The "nature and seriousness of an offense" depends to a considerable degree on "whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was f requently repeated." *Douglas v. Veterans Administration*, 5 MSPR 280, 305 (1981). Judge Clancy, having not only reviewed the record but listened to the testimony of the witnesses at the hearing and observed their demeanor, made a specific finding on this point. "Given her experience in the unit and her familiarity with Mr. "S"'s impairments," said Judge Clancy, "Appellant should have known that Mr. "S" may well perceive the involuntary grooming as abusive or hostile." Joint Appx. at 17. After expressly declaring that the Petitioner's behavior was "unintentional" Judge Clancy determined that the maximum reasonable penalty was a 15-day suspension.

The MSPB's final decision fails to mention, much less address, the crucial factor of the Petitioner's state of mind. Having erroneously found that the Petitioner cut Mr. "S"'s hair and trimmed his beard while he was repeatedly protesting these services and while he was being held down by two other employees, the MSPB opaquely stated that the Respondent "properly considered the behavior as "assaultive" in its penalty determination." Joint Appx. at 3. Perhaps itself confused as to what constitutes an unintentional assault, the MSPB later stated:

> Even if we were to discount the consideration of "assaultive" behavior, the deciding official appropriately determined that the Appellant's misconduct caused undue stress to a patient who relied on her for compassion in professional service, that the Appellant's position requires a need for sensitively and advocacy for the patient, that the Appellant's misconduct caused a breach of trust that harms the patients, their families, and the Agency and that the removal is consistent with the Agency's table of penalties.

Joint Appx. at 4.

To put it more bluntly, the MSPB determined that your Petitioner's state of mind was immaterial - that given the "seriousness" of her behavior, removal from employment was not excessive, even though its own case precedent mandates consideration of the employee's mental sta te in assessing "the nature of seriousness of the offense. "Douglas, supra.

This is abuse of discretion in the same manner that the MSPB's refusal to consider the charged employee's state of mind in *VanFossen, supra,* was an abuse of discretion. Your Petitioner had 17 years of faithful service, no prior disciplinary action, and she had never been accused of patient abuse. The MSPB's conclusion that Ms. Catellier "weighed the relevant factors" is flatly contradicted by the re cord and by Judge Clancy's factual findings. Specifically, Ms. Catellier asserted that Ms. Taylor showed no expression of remorse. As noted by Judge Clancy, this was simply false, not only because of the Petitioner's testimony at the hearing but also because of her testimony to the investigative panel and because o her written reply to the proposal to remove her.

Patient abuse may well be a "strict liability offense" under Respondent's policy, which states that "one does not have to in tend to abuse a patient to commit patient abuse. The patient's perception of how he/she was treated is essential to determining whether abuse occurred. However, patients with limited or no cognitive ability can still be abused. " Joint Appx. at 269.

This does *not* mean that patient abuse requires a "strict liability penalty." The Respondent's own suggested table of penalties recommends a range from "reprimand to removal" for patient abuse. Joint Appx. at 275. In *Stephens v. Derwinski*, 490 F. Supp. 29, 30 (D.D.C. 1992), the court acknowledged the level of deference owed to Respondent on an issue of patient abuse by one of it's employees, but said "to fire a ten-year employee based on the equivocal testimony of only one other person strains such deference beyond its limits." The MSPB itself found mitigation of a removal penalty for patient abuse by an employee of Respondent to

be required where there was no support for Respondent's assertions that removal was necessary to deter such conduct, that the employee exhibited no remorse and that retaining the employee would jeopardize patients and Respondent's mission. *Theisen v. Veterans Administration*, 31 MSPR 277, 281 (1986).

To refuse to consider the unintentional nature of the Petitioner's behavior, her long record of satisfactory service, her lack of any prior discipline and the Respondent's own formal admission that the Petitioner was never in formed before September 23, 2003 that Mr. "S" didn't like his hair cut is to abdicate the MSPB's responsibility to "consider and balance those relevant factors in determining an appropriate penalty." *LaChance v. Devall*, 178 F. 3d 1246, 1257 (Fed. Cir. 1999).

Had the MSPB properly discharged its obligation to identify and responsibly balance all relevant mitigating factors, and to justify its decision to reject findings of fact by one of its administrative judges grounded on his assessment of testimonial demeanor, it would have affirmed Judge Clancy's initial decision. The Court should do so now.

Therefore, based upon the foregoing, your Petitioner asserts that the MSBP erred in upholding her unlawful termination.

CONCLUSION

Based upon the foregoing facts, federal statutes and case law, your Petitioner respectfully requests this Honorable Court to receive this Petition for Writ of Certiorari, grant review on the issue presented.

Your Petitioner has proven through documentary evidence that her federal rights were violated.

The Respondent's investigative panel characterized the "root cause" of the haircut incident as "the Staff projected their hygiene-grooming norms to the patient." Joint Appx. at 117.

We respectfully suggest that Respondent expects employees in the Petitioner's position to do exactly that. Caring for psychiatric patients is a line of work neither appreciated nor compensated by our society as much as it should be. When Respondent's licensed practical nurses and nursing assistants dress and undress psychiatric patients, clean and change them when they can't attend to their bowel and urinary functions, wipe food and toothpaste off their faces, bathe them; and yes, even try to trim their hair or beards if they are "quite long, gnarled and unkempt" (Joint Appx. at 14), they are not committing patient abuse. Even if Respondent wants to call anything a psychiatric patient decides to report two days later as patient abuse, it still does not give Respondent the right to impose a grossly unreasonable penalty.

The Petitioner has devoted her entire career to caring for the psychiatric patients at the VA Medical Center in Biloxi. It is not hard to guess her prospects for future employment after having been stigmatized by a charge of abusing a psychiatric patient. There is no question that a penalty far short of removal would be more than sufficient to deter the Respondent and other employees from engaging in any behavior remotely similar to the "haircut incident" in the future.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, your Petitioner respectfully requests this Honorable Court to reverse the MSPB's decision and to remand the Petitioner's appeal to the MSPB with instructions to reinstate Judge Clancy's initial decision and to restore your Petitioner to work with all appropriate backpay and all emoluments.

Respectfully submitted on this the 14 day of June, 2006.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NO. 0752-04-0254-I-1

LAUREEN B. TAYLOR,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS

Appellee.

ORDER, dated March 29, 2005 before Neil A. G. McPhie, Chairman, Susanne T. Marshall, Member and Barbara J. Sapin, Member

OPINION AND ORDER

¶ 1 The agency petitions for review, and the appellant cross petitions for review, of the initial decision issued August 11, 2004, mitigating the appellant's removal to a fifteen-day suspension. For these reasons set forth below, the Board GRANTS the agency's petition, DENIES he appellant's cross petition, REVERSES the initial decision, and SUSTAINS the appellant's removal.

BACKGROUND

¶ 2 The agency removed the appellant from her Licensed Practical Nurse position based upon the charge of abusing a patient at one of its health care facilities. The agency alleged that the appellant cut the patient's hair and trimmed his beard without the patient's consent, that the patient repeatedly stated that he did not want his hair or beard cut, and that, despite the patient's resistance, the appellant continued these tasks while two other employees restrained the patient. Appeal File, Tab 4, subtab 4f.

¶ 3 Following the hearing, the administrative judge mitigated the appellant's removal to a 15-day suspension. Appeal File, Tab 14. The administrative judge first found that, while the agency did not prove all of the matters contained in its narrative description of the incident it still proved its patient abuse charge. The administrative judge next found that, although the agency's only charge was sustained, mitigation was warranted because the deciding official considered several erroneous facts and ignored "crucial" factors in determining the penalty. The administrative judge concluded that a 15-day suspension was the maximum reasonable penalty for the misconduct in light of its unintentional nature, the absence of any physical or long-term psychological damage to the patient, the appellant's 17 years of service with no prior discipline, the appellant's remorse, and the agency's table of penalties that set forth a penalty range from reprimand to removal for the first offense of patient abuse. The administrative judge also ordered the agency to provide interim relief to the appellant in the event either party filed a petition for review. *Id.*

¶ 4 In its petition for review, the agency asserts that the administrative judge erred in mitigating the removal penalty. Petition for Review File, Tab 1.

The agency argues that the appellant's misconduct was not unintentional, as the administrative judge found, and that she instead imposed her wishes upon the patient despite his verbal and physical resistance. *Id.* It argues that the administrative judge failed to consider sufficiently the patient's right to refuse treatment, even a patient with limited mental capacity. The agency also submitted evidence that it provided the appellant wit the ordered interim relief. *Id.*

¶ 5 In her cross petition for review, the appellant asserts that the agency failed to prove its charge against her. Petition for Review File, Tab 3. She argues that the agency charged her with "assaultive" and intentional behavior and that the administrative judge found that these allegations were unsupported. Thus, the appellant argues that the agency failed to prove its charge in its entirety and so her removal must be reversed. *Id.*

ANALYSIS

¶ 6 The appellant's cross petition fails to provide a basis for granting review. Contrary to the appellant's claim the agency did not charge her with assault or any offense requiring it to prove specific intent. The agency's sole charge was "abuse of VA patient." Appeal File, Tab 4, subtabs 4b, 4f. The agency then described the incident where the appellant cut the patient's hair and trimmed his beard after he repeatedly stated that he did not want these services, and that the appellant continued her actions while the patient was held down by two other employees, even though the patient continued his resistance. *Id.* Under these circumstances, the agency did not charge the appellant with assault

and was not required to prove intent, even though the agency properly considered the behavior as "assaultive" in its penalty determination. Appeal File, Tab 4, subtab 4c; see *Fernandez v. Department of Agriculture*, 95 M.S.P.R. 63, ¶¶ 6-8 (2003).

¶ 7 We agree, however, with the agency's claim that the administrative judge erred in mitigating the removal penalty. When the Board sustains all of an agency's charges, it reviews the agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Cantu v. Department of the Treasury*, 88 M.S.P.R. 253, ¶ 4 (2001). In determining whether the selected penalty is reasonable, the Board gives due deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to assure that management judgment has been properly exercised. Id. Thus, the Board will disturb an agency's chosen penalty only if it funds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceeded the limits of reasonableness. Id.

¶ 8 We find that the administrative judge failed to follow this standard in the present case. The record established that the deciding official weighed the relevant factors in deciding to remove the appellant. She considered the appellant's favorable employment record and work history, but concluded that the seriousness of the offense warranted the appellant's removal. Appeal File, Tab 4, subtab 4c. Even if we were to dis count the consideration of the "assaultive" behavior, the deciding official appropriately determined that the appellant's misconduct caused undue stress to a patient who relied on her for compassion and professional service, that the appellant's position requires a need for sensitivity and advocacy for

the patient, that the appellant's misconduct caused a breach of trust that harms the patients, their families, and the agency, and that lathe removal penalty is consistent wit the agency's table of penalties. Id. Thus, the deciding official weighed the relevant factors, and we find that her judgment did not clearly exceed the limits of reasonableness. See *Harris v. Veterans Administration*, 35 M.S.P.LR. 70, 72-73 (1987). Accordingly, the deciding official's determination is entitled to deference. See *Cantu*, 88 M.S.P.R., 253, ¶ 4.

ORDER

¶ 9 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c)(5 C.F.R. § 1201.113(c)).

NOTE: Pursuant to Fed. Cir. R. 47.6, this dispostion is not citable as precedent. It is public record.

United States Court of Appeals For The Federal Circuit

05-3187

LAUREEN TAYLOR

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS

Respondent.

DECIDED: March 17, 2006

Before MICHEL, Chief Judge, MAYER, and LOURIE, Circuit Judges.

MICHEL, Chief Judge.

Laureen Taylor, a Licensed Practical Nurse ("LPN"), appeals a decision of the United States Merit Systems Protection Board ("Board") upholding a decision of the Department of Veterans Affairs removing her from service as a psychiatric nurse at

a veterans Administration Medical Center 9"VAMC") hospital because of patient abuse. She was found to have abused a paranoid schizophrenic patient by cutting his hair and attempting to shave his beard while restraining the patient, after the patient had repeatedly objected and resisted. Here, Ms. Taylor is not appealing the finding of patient abuse. Rather, she only appeals the penalty of removal as unreasonable.

Upon removal from the VAMC, Ms. Taylor appealed to the Board. In its initial decision, the Board mitigated her penalty to a fifteen-day suspension, stating that the agency failed to property weigh the relevant factors as to penalty. *Taylor v. Dep't of Veterans Affairs*, No. AT-0752-04-0254-I-1 (M.S.P.B. Aug. 11, 2004) ("*Taylor I*"). The agency then petitioned for review of the initial decision. The petition was granted. In its final decision, the Board overturned the initial decision and sustained the removal penalty of the agency, reasoning that the agency had properly weighed the relevant factors. *Taylor v. Dep't Veterans Affairs*, 98 M.S.P.R. 337 (2005) ("Taylor II"). Because we agree wit the final decision of the Board that the agency properly weighed the relevant factors and that the penalty was not unreasonable, we affirm.

I.

Laureen Taylor worked as a psychiatric nurse at the VAMC in Biloxi, Mississippi. She had worked for the Veterans Administration for seventeen years and had no prior record of discipline. On the evening of September 23, 2003, Ms. Taylor was making her rounds dispensing medication to patients. Ms. Trentcosta, a nursing assistant who had been with the VAMC for approximately one and a half months, was making her rounds

offering haircuts and shaves to patients who requested them.[1] At some point while Ms. Taylor and Ms. Trentcosta were making their respective rounds, Ms. Taylor told the patient in question, Mr. S,[2] that he needed a haircut and that she was going to cut his hair, according to her testimony before the VAMC investigative panel.[3] Ms. Taylor testified before the agency investigative panel that he responded that he did not want a haircut.[4] Ms. Taylor admitted to

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[1] A barber shop was located on the premises of the medical center. Patients were able to obtain haircuts and shaves from the barber shop for a fee. It is undisputed that the psychiatric patient in question, Mr. S, could afford a haircut and shave from the barber shop, such that lack of financial means was not the reason he had not obtained a haircut and shave from the barber shop.

[2] To protect the confidentiality of the patient, his name is being abbreviated.

[3] There is some dispute as to whether it was Ms. Trentcosta's idea or ms. Taylor's idea to cut Mr. S" hair. Regardless, Ms. Taylor admitted to the agency panel that she was the one who actually cut his hair and attempted to shave his beard.

[4] The number of times that Mr. S said that he did not want a haircut is disputed. Ms. Taylor asserts that Mr. S said that he did not want a haircut only one, immediately prior to her giving him a haircut. Yet Mr. S stated that he said that he did not want a haircut twice prior to Ms. Taylor's beginning the haircut and that he "struggled". Nonetheless, Ms. Taylor does admit that, after she told him that she was not going to cut his hair and prior to her beginning the haircut, Ms. S did state that he did not want a haircut.

the agency panel that she nonetheless proceeded to cut his hair.[5] Upon completion of the haircut, Ms. Taylor began to shave Mr. S' beard. At this point, he verbally objected and physically resisted by

"rolling off," according to ms. Taylor's agency panel testimony.[6] Ms. Trentcosta then held the wheel of his wheelchair to prevent him from leaving, as Ms. Taylor testified. Ms. Taylor related to the agency panel that she then said to Ms. Trentcosta, "Lisa, don't hurt yourself because you know you are pregnant. . .[G]o get Bruce "Kinnemore]." Ms. Trentcosta did so. When Ms. Trentcosta returned with Mr. Kinnemore, another nursing assistant, Mr. S again stated that he did not want his beard shaved, as Ms. Taylor testified before the agency panel. At that point, Mr. Kinnemore and Ms. Trentcosta "[held] his hand and his wheel to keep [him] from leaving out," according to Ms. Taylor's testimony to the agency panel. Immediately thereafter, Ms. S again physically resisted.[7] In the words of Ms. Taylor, "that's when the really started to fussing and cussing." According to Mr. Kinnemore's testimony to the investigative panel, at this point Mr. Kinnemore "put [his] hands on [Mr. S'] wrists" and "held [Mr. S'] wrists." Then Mr. S "started kicking and then started saying no, no, no, and then we stopped," according to Mr. Kinnemore's testimony before the agency panel.

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[5] Ms. Taylor testified that, during the haircut, Mr. S did not again protest. Mr. S testified that he did further protest during the haircut.

[6] "Rolling off" appears to mean "roll his [wheel] chair to move out - to leave."

[7] Mr. S testified before the agency panel that he did not want to physically resist too much or too strenuously because of Ms. Trentcosta's presence and her pregnant state. Ms. Trentcosta was eight months pregnant at the time of the incident. Mr. S stated that "she's pregnant and I didn't want to wrestle too much with the woman."

Ms. Taylor then ceased attempting to shave Mr. S' beard.

On September 25, two days later, Mr. S complained about this incident to his social worker, Alma Jimerson. Ms. Jimerson then made a formal Report of Complaint.

An internal investigation by the Administrative Board of Investigation ensured, led by Darlene Bellais, RN, the Compliance Officer and Chairperson of the Board of Investigation. Before the investigative panel, Ms. Taylor was asked, "Laureen, if you could do anything differently, what would it have been that night?" She responded that she "didn't think nothing of it" and that she "cared enough to help him on numerous occasions to help him clean up."[8] When asked whether she would like to make a final statement, she replied that she was "sadly hurting that [she] was accused of patient abuse" and that she "tried to do the best [she] can to help a person, a patient. . ."

The panel then proposed removal as the appropriate penalty, based upon a table of penalty range from reprimand to removal. In a report entitled "Douglas Factors," the Deciding Official, Julie Catellier, LPN, Director of the Center, assessed the Douglas Factors report: the nature and seriousness of the offense and the restraint of Mr. S even after his repeated objection. Based upon this weighing of the Douglas factors, she found the penalty of removal appropriate. The agency thus removed Ms. Taylor from her position by a separate decision letter, also signed by Ms. Catellier.

II.

This Court must affirm a Board decision unless it is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law;

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[8] Ms. Taylor testified before the agency panel that on a prior occasion, she had "cut [Mr. S'] hair" and "clean[ed] him up" prior to one of his doctor's appointments. That testimony notwithstanding, another nurse, Karen Gillette, Associate Nurse Executive for

or unsupported by substantial evidence. 5U.S.C. § 7703(c). In determining the appropriateness of a penalty, an agency must weigh the factors outlined in *Douglas vs. Veterans Admin.*, 5 M.S.P.R. 280 (1981). When, as where, the Board sustains the agency's charge, the agency's decision may only be reviewed to determine whether the agency properly weighed the relevant Douglas factors and whether the penalty was reasonable based on its weighing of factors. *Cantu v. Dep't of the Treasury*, 88 M.S.P.R. 253 (2001).

The first Douglas factor is the "nature and seriousness of the offense." 5M.S.P.R. at 305. In her Douglas Factors report, Ms. Catellier stated that the "alleged Offense is very serious. Ms. Taylor's assaultive behavior toward the patient[] created an atmosphere the patient perceived as hostile. Ms. Taylor's in appropriate behavior caused undue stress to a patient who relied on her for compassion and professional service." The record does not support a finding that ms. Catellier erred in determining that this offense was "very serious." Indeed, the restraint of Mr. S, especially after he had repeatedly objected and resisted, strongly supports a finding that the offense was "very serious." Thus, the nature and seriousness of the offense weighs in favor of a strong penalty.

Another Douglas factor of particular relevance is the "consistency of the penalty with any applicable agency table of penalties." 5 M.S.P.R. at 305. For a first offense of patient abuse, the table of penalties provides for a penalty ranging from reprimand to removal. Moreover, Memorandum No. 00-55-00, titled "Protection of Patients from Abuse," emphasizes that **"[t]he Department of Veterans Affairs has no tolerance for mistreatment or abuse of patients by its employees."** (Emphasis in original).[9] Indeed, this Memorandum informs employees that

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9 The Definitions section of this Memorandum states: "Patient abuse includes mental, p hysical, sexual, and verbal abuse, such as the following: (a) any action or behavior that conflicts with patient's

"[i]f patient abuse is proven, appropriate disciplinary action will be taken, including possible dismissal from employment.[10] Ms. Taylor disputes the statement by Ms. Catellier in Ms. Catellier's assessment of the Douglas factors that Ms. Taylor "fails to acknowledge any wrongdoing." Ms. Taylor argues that consideration of this allegedly erroneous fact in the weighing of the Douglas factors unfairly skewed the Douglas analysis. Yet whether or not Ms. Taylor's statements to the panel showed such a failure, the other factors alone, in particular the seriousness of the offense, supported removal as an appropriate penalty, especially given the zero tolerance policy for patient abuse and the notice to employees of the definition of patient abuse and the possible penalty of removal. Thus, the penalty of removal of Ms. Taylor for patient abuse was consistent with the possible range of penalties for the offense, given the facts of this case.

III.

Because we agree with final decision of the Board that the Douglas factors were properly weighed, in particular the nature and seriousness of the offense of patient abuse, we affirm.

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rights, identified in VA regulations 38 CFR § 17.34a;...(c)willful violations of a patient's privacy;....(e) willful physical injury."

10 Ms. Taylor admitted that she is aware of this Memorandum.